

Navigating the Duty to Accommodate



CSSEA

OCTOBER 10, 2024

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Agenda

Review of BC *Human Rights Code*

- Important provisions
- Interaction with collective agreement

Define key terms

- i.e. Discrimination, Disability, DTA ,BFOR and undue hardship

Discuss key principles, responsibilities, and challenges of DTA

How to respond to requests for accommodations



BC Human Rights Code

Purposes

3 The purposes of this Code are as follows:

- (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
- (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
- (c) to prevent discrimination prohibited by this Code;
- (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;
- (e) to provide a means of redress for those persons who are discriminated against contrary to this Code;

Discrimination in employment

13 (1) A person must not

(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment because of the **race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age** of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

(2) An employment agency must not refuse to refer a person for employment for any reason mentioned in subsection (1).

Exceptions

(3) Subsection (1) does not apply

- a) as it relates to age, to a **bona fide scheme based on seniority**, or
- b) (b) as it relates to marital status, physical or mental disability, sex or age, to the **operation of a bona fide retirement, superannuation or pension plan or to a bona fide group or employee insurance plan**, or not the plan is the subject of a contract of insurance between an insurer and an employer.

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a **bona fide occupational requirement**.

Discrimination by unions associations

14 A trade union, employers' organization or occupational association must not

(a) exclude any person from membership,

(b) expel or suspend any member, or

(c) discriminate against any person or member

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or member, or because that person or member has been convicted of a criminal or summary conviction offence that is unrelated to the membership or intended membership.

Remedies



- 37 (2) If the member or panel determines that the complaint is justified, the member or panel
- (a) must order the person that contravened this Code to cease the contravention and to refrain from committing the same or a similar contravention,
 - (b) may make a declaratory order that the conduct complained of, or similar conduct, is discrimination contrary to this Code,
 - (c) may order the person that contravened this Code to do one or both of the following:
 - (i) take steps, specified in the order, to ameliorate the effects of the discriminatory practice; practice;
 - (ii) adopt and implement an employment equity program or other special program to ameliorate the conditions of disadvantaged individuals or groups if the evidence at the hearing indicates the person has engaged in a pattern or practice that contravenes this Code, Code, and



Remedies (con't)

- (d) if the person discriminated against is a party to the complaint, or is an identifiable member of a group or class on behalf of which a complaint is filed, may order the person that contravened this Code to do one or more of the following:
- (i) make available to the person discriminated against the right, opportunity or privilege that, in the opinion of the member or panel, the person was denied contrary to this Code;
 - (ii) compensate the person discriminated against for all, or a part the member or panel determines, of any wages or salary lost, or expenses incurred, by the contravention;
 - (iii) pay to the person discriminated against an amount that the member or panel considers appropriate to compensate that person for injury to dignity, feelings and self respect or to any of them.



The Law and the C.A.

Human rights legislation and labour law are understood to be part of any collective agreement and can be applied as such.

There does not need to be any specific language speaking to the law in a collective agreement for it to be enforceable.

Forum for complaint

BC Human
Rights
Tribunal

Open to all individuals (including union members)

Grievance
arbitration

Only available to unionized workers

Arbitrator has jurisdiction to apply *Code* and grant same remedies

Definitions

Protected Grounds

Discrimination

- Direct / Indirect

Disability

Duty to Accommodate (DTA)

Bona Fide Occupational Requirement (BFOR)

Undue Hardship

Prohibited Grounds of Discrimination

- Race
- Colour,
- Ancestry
- Place of Origin
- Political Belief
- Religion
- Marital Status
- Family Status
- Physical or Mental Disability
- Sex
- Sexual orientation
- Gender identify and expression
- Age
- Criminal or Summary Conviction Offence that is unrelated to the employment or to the intended employment of that person.

Discrimination

- Treating a person (or persons) differently on the basis of a prohibited ground under the *Human Rights Code* without legal justification (direct discrimination);

OR

- Failing to alter a rule, policy, working conditions or environment (that is not a *bona fide* occupational requirement) in order to accommodate a person or persons as required by law (adverse impact discrimination)



Case: O'Malley v. Simpsons- Sears Ltd., 1985

Situation: All workers had the same shift . In order for one salesclerk to be able to observe the Sabbath, she was forced to work part time.

Ruling: Everyone being treated equally CAN discriminate. This case established the DTA unless it creates undue hardship.

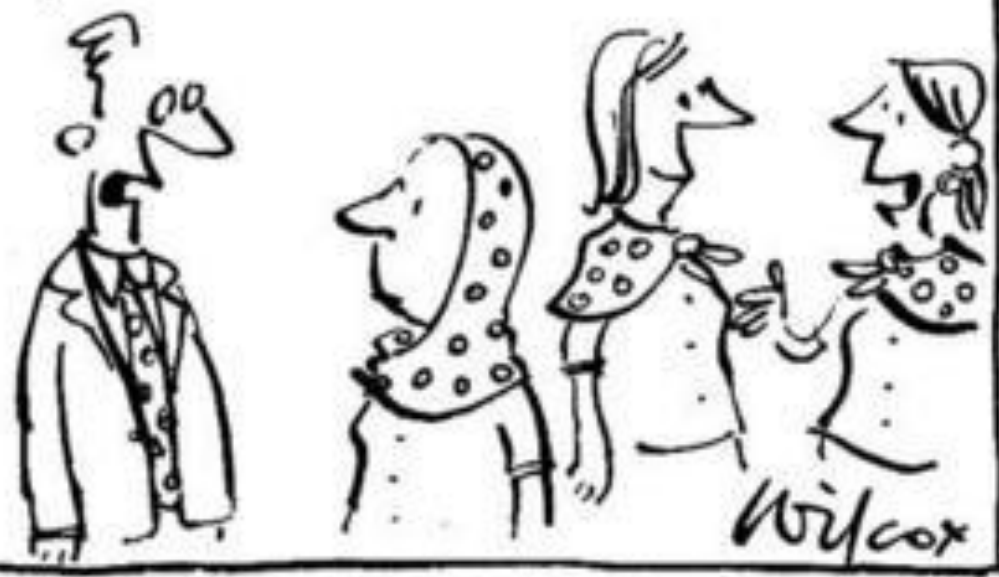
Protected Grounds: Religion

When we ask
whether
something
constitutes
legal
discrimination
we must show
three factors:

- 1) the complainant possesses a protected characteristic
- 2) the complainant experiences an adverse impact with respect to their employment; and
- 3) the protected characteristic is a factor in the adverse impact.

*(Moore v British Columbia (Education), 2012
SCC 6) – the “Moore test”*

I'm afraid your headscarf
clashes with our office
dress code...





"All the other women in the office are suing you for sexual harassment. Since you haven't sexually harassed me, I'm suing you for discrimination."

Tänker inte översätta :)

Affirmative Action

The *BC Code* exempts organizations that provide housing, employment, and services to an identified group (such as women only) where those services are meant to address past disadvantage.

In BC, the BC Human Rights Tribunal can approve special programs that are designed to benefit groups who have been historically disadvantaged. For example, education programs can be aimed specifically at First Nations people.

What is a Disability?

Not defined in *Human Rights Code* in BC

- Interpreted very broadly

Generally, understood to include ...

any involuntary physical or mental condition that has some degree of permanence. It does not include a single temporary injury, a series of temporary injuries or a series of unrelated illnesses.

Disability Con't

Examples of disabilities include: 

- mental illnesses (such as schizophrenia, ADHD, general anxiety disorder, etc)
- developmental delays
- learning disabilities (such as dyslexia)
- drug or alcohol addiction
- HIV/AIDS
- sensory impairments (such as blindness)
- Injuries and illnesses even if short term



What about Family Status?

‘Family status’ is a protected ground in B.C.’s [*Human Rights Code*](#), prohibiting discrimination based on a person’s family situation, such as if a person is a caregiver for children or elderly parents.

Decision makers in B.C. historically used a two-part test, wherein it is asked whether the employer unilaterally changed a worker’s terms of employment and whether there was a serious interference with a substantial parental or other family duty as a result.

In *Gibraltar Mines Ltd. v. Harvey* the BC Court of Appeal considered whether the law did, in fact, require a unilateral change to terms of employment as part of the legal test to establish discrimination.

Court held that complainants are not required to show that their employer has changed their terms of employment (i.e. parental obligations may change during their employment and give rise to a duty to accommodate).

Court expressed the view that the requirement for complainants to show a “serious interference” with a “substantial obligation” is consistent with the *Moore* test.

Duty to Accommodate

Not defined (or mentioned) in the *Human Rights Code*


Generally understood to refer to...

- the obligation of an employer or service provider to take measures to eliminate disadvantages to employees, prospective employees or clients that result from a rule, practice or physical barrier that has, or may have, an impact on individuals or groups protected under the BC *Human Rights Code*.
- Employers must make sure that they build accommodation into their policies and practices as much as possible from the outset, and must accommodate up to the point of **undue hardship**, considering health, safety and cost, etc.

Bona Fide Occupational Requirement

Not defined in *Code*
Generally understood
to be...

a rule that establishes a requirement which is necessary for the proper or efficient performance of a job.



It is undue hardship for an employer to alter a *BFOR*

Meorin, 1999: A groundbreaking DTA case

Tawney Meorin was a BC firefighter who claimed that fitness tests discriminated against her on the basis of gender. It led to:

- The 3-step test (BFOR);
- Requiring employers to be pro-active about building accommodation into workplace policies, rules and practices;
- Further defined 'undue hardship'.

3-step test: BFOR?

The 3 step test answers the question “Is the standard, practice or policy that is deemed discriminatory by the worker either:

1. Rationally connected to the job?
2. Adopted in good faith? (the honest belief that is was necessary for work goals)
3. ‘Reasonably necessary’ to do the job?”

If the answer is **YES to ALL 3**, it can be considered a *bona fide* occupational requirement (**BFOR**).

Legal Burden

Once prima facie discrimination established, burden shifts to employer to show accommodation cannot be made without undue hardship

Union, employer and employee must work together to find appropriate accommodation before undue hardship can be claimed

Undue Hardship

Precisely what constitutes the point of undue hardship will vary based on unique facts of each and every case. It is the employer that bears the burden of proving when this threshold has been met.

An employer or service provider can claim undue hardship when adjustments to a policy, practice, by-law or building would cost too much, or create risks to health or safety, etc.

There is no precise legal definition of undue hardship or a standard formula for determining undue hardship. Each situation should be viewed as unique and assessed individually.

It is not enough to claim undue hardship based on an assumption or opinion, or by simply saying there is some cost. To prove undue hardship, an employer or service provider will have to provide evidence as to the nature and extent of the hardship. Some valid considerations include:

- disruption or variance from the provisions of any applicable collective agreement
- the effect on morale of other employees
- the size of the employer's operation
- safety considerations
- cost

(See, for example, *AirBC Ltd.* (1995), [1995 CanLII 18343 \(CA LA\)](#), 50 LAC (4th) 93 for a list of factors to be considered).

Another factor that may affect the undue hardship analysis is the duration of the accommodation.

- An employer may be expected to tolerate more disruption from an accommodation if it is only on a temporary basis. If the accommodation is longer-term or indefinite, an employer may be able to more readily establish undue hardship if the disruption to its business or other employees is significant (see, for example, *Simcoe County District School Board*, [2002] OLAA No 946).

Duty to Accommodate

Employers are under a duty to explore, in a timely fashion, options for accommodation that will allow the employee to continue to work when they are unable to fulfill their regular hours and/or duties due to disability. The search for a suitable accommodation will involve substantial consultation with the employee and the union.

The duty to accommodate requires all parties (the employer, the union, and the employee) to work together toward a solution that is reasonable based on all the facts and circumstances (*McGill University Health Centre (Montreal General Hospital) v. Syndicat des employes de l'Hopital general de Montreal*, [2007 SCC 4](#) at para [22](#)).

A reasonable accommodation does not need to be an employee's perfect solution. However, it should, as much as possible, fulfill the following characteristics:

- Should be consistent with the employee's capacities;
- Should involve substantially similar working conditions and earning opportunities; and
- Should not involve significant adversity to that employee.

Duty to Inquire

Employers are not expected to diagnose mental illness or addictions, but managers and supervisors should be aware of changes in employee behaviour and workplace performance.

- In some cases, there may be a duty to inquire and managers/supervisors may need to speak with an employee privately to assess whether mental illness, addiction or disability may be a factor in a workplace performance issue.

Medical Information to Support Request for Accommodation

An employee seeking accommodation must provide enough information so that the employer can understand the accommodation needed. The employer needs to know how the employee's condition affects their work.

Generally speaking, an employer is entitled to more medical information the longer an accommodation is required

The employee does not have to disclose information about the diagnosis, the history of the illness or its treatment.

Medical information is confidential personal information and should not be accessible by managers

Reasonable Accommodation

An employee has a duty to accept reasonable accommodation, even if it is not the employee's preferred solution. This means the employee, in some cases, may need to compromise and accept such outcomes as reduced earnings, changes to their work environment, and alternate assignments (see: Palmer & Snyder, *Collective Agreement Arbitration in Canada* (Toronto: LexisNexis Canada, 2017) at p. 387).

“Accommodations must be reasonable, not perfect.”

Order of priority for finding the right accommodation

The first step in any search for accommodation is to explore whether the employee can stay in their pre-disability job, with or without modifications. This exploration should be informed by medical information setting out the employee's limitations and restrictions and the duties the employee can and cannot do.

If it is possible for an employer to place the employee back in their pre-disability job without undue hardship, the employer must do so.

- This includes, as much as possible, enabling the employee to have substantially the same hours and income they had before their disability. If possible, they should retain their pre-disability status, whether full-time, part-time, casual, or other.

The employer may need to consider any assistive devices that would enable the employee to perform some or all of their pre-disability job where the cost of these devices would not amount to undue hardship.

If the employee can perform some duties of their pre-injury job and not others, the employer should consider reassigning those duties the employee cannot perform to other employees (*Canada Safeway, supra; Rothmans, Benson & Hedges Inc. (1990)*, [1990 CanLII 12839 \(ON LA\)](#), 10 LAC 4th 18)

Similarly, if the employee requires a specific work schedule due to their disability, the employer should consider reassigning shifts the employee cannot work to other employees.

Accommodation into a Different Position

If an employee cannot be accommodated in their own position, the parties should then comprehensively explore whether the employee can be placed in an alternative job either with or without modifications. (See generally *Calgary District Hospital Group* (1994), [1994 CanLII 18594 \(AB GAA\)](#), 41 LAC 4th 319.)

- An employer may be required to provide some minimal training or a brief trial period (See *Canada Safeway, supra*; *Calgary District Hospital Group, supra*). While vacant positions ought first be considered, the jurisprudence supports that the duty to accommodate may in some instances require that an incumbent employee be transferred to allow an accommodation to be found.

In considering an alternate position for an employee requiring accommodation, an employer is required to consider whether it can bundle duties from multiple positions to create a productive job for the employee. (See, for example, *Vancouver School Board* [1999] BCCAAA No 365).

- an employer is not required to create work for the employee that is of no value to the employer or would be unproductive.

Challenges for the Workplace

DTA process = confidential

- Co-workers may believe individual getting preferential treatment

May have negative impact on others

- Direct or indirect

Lack of awareness of human rights law and legal principles

- Can lead to animosity and perception of unfairness

Implications for Diversity and Equality

Duty to accommodate essential component in ensuring equality in workplace

- Enables individuals with different needs based on protected grounds to participate as fully and equally as possible

Not about giving people preferential treatment!

- It's about providing equal opportunity Need to reframe discussion

Equality versus Equity



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How can we
help make
DTA
successful?

How can we build support among employees when members are being accommodated in the workplace?

A few key points to remember

Being treated equally does not always mean being treated the same.

When an employer does not accommodate a worker who requires it is **discrimination** unless the undue hardship threshold has been met

Questions?

